Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MIGUEL MEDRANO,

Petitioner,

v.

EXCEL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Is a state law claim that an employer's collectively bargained policy violates state law, because it punishes workers who file successful workers' compensation claims, preempted by section 301 of the Labor-Management Relations Act, which federalizes all suits "for violation of" a collective bargaining agreement, on the theory that, to decide whether the collective bargaining agreement is illegal, the court must look at the agreement?

LISTING OF PARTIES IN THE COURT BELOW

The names of all parties to the proceeding in the court of appeals appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Miguel Medrano petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that court's judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 985 F.2d 230, and appears in the Appendix to this Petition at 1a to 9a (App. 1a-9a). The district court did not issue any opinions addressing the issue of preemption, but implicitly rejected respondent's preemption argument in denying

respondent's motion for judgment notwithstanding the verdict. App. 10a.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1993. App. 1a-9a. This Court has jurisdiction to review that judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Article 8307c of the Texas Revised Civil Statutes Annotated provides as follows:

> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workers Compensation Act, or has testified or is about to testify in any such proceeding.

> Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be on the employee.

STATEMENT

A. Facts.

Petitioner Miguel Medrano was employed as a meat cutter in a packing plant operated by respondent Excel Corporation in Plainview, Texas. He was employed in a bargaining unit represented by Local 540 of the United Food and Commercial Workers, and the terms and conditions of his employment were regulated by a collective bargaining agreement ("CBA") between respondent and Local 540, as well as by various state and federal laws.

In November 1989, petitioner injured his wrist and shoulder at work. His treating physicians imposed various restrictions on his return to work, which prevented him from working for nearly a year. Petitioner filed workers' compensation claims, and began to receive weekly benefits for temporary injuries.

He returned to work in October, 1990, and was assigned to an extremely arduous job which, according to his testimony, required him to do by himself a job that would ordinarily have been done by two people. Petitioner again experienced difficulty from his injuries, and on November 13, 1990, his physicians imposed temporary restrictions, pending the completion of certain tests, pursuant to which he was taken off work.

On November 28, 1990, petitioner settled his workers' compensation claims and received a lump sum settlement for limited but permanent injuries. Following the completion of his medical tests, petitioner's physician gave him a release to return to work. The evidence was conflicting on whether, at that point, there were jobs available within the plant that petitioner could have performed. In any event, when he attempted to return to work on January 16, 1991, petitioner was immediately terminated because he had settled his workers' compensation claim.

Article XVII, Section 11(D) of the CBA provides that employees could be off work, for injuries or for other reasons, for as long as eighteen months without losing their jobs. However, under Article XVII, Section 11(F), an employee who entered a "full settlement . . . for a disability that the Company cannot accommodate" loses his job immediately. At trial, respondent's representatives conceded that the combined effect of these two provisions was to allow injured workers as long as eighteen months to recuperate sufficiently to be able to perform work at the plant; but if such workers obtained workers' compensation settlements, they would have to be ready to work immediately upon settlement or face termination.

The CBA provided a grievance and arbitration procedure for resolution of disputes between the parties. However, strict limits were imposed on the arbitrator, who "shall not have authority other than to apply terms and conditions specifically set forth in this Agreement." Article XVIII, Section 1, Fourth.

B. Proceedings Below.

On December 13, 1990, petitioner and thirty-seven other Excel employees filed an action against respondent in the United States District Court for the Northern District of

Texas, Lubbock Division, alleging that respondent had engaged in a pattern of harassment, discrimination and retaliation against employees who exercised their rights under the Texas Workers Compensation Act, in violation of Tex. Rev. Civ. Stat. Ann. art. 8307c. The actions were severed, and petitioner proceeded individually with his claim of retaliatory discharge under article 8307c. Respondent defended on the ground that it was simply following the CBA in firing petitioner, Answer to Second Amended Complaint, Docket No. 78, at 4, and sought summary judgment on that ground. Docket No. 92, at 3, 4. After summary judgment was denied, the case went to trial.

Rather than waiting for respondent to put its CBA-based defense before the jury, petitioner met the defense head-on in his case-in-chief, arguing that respondent's general policy regarding the reinstatement of injured workers, based on whether they demanded workers' compensation settlements, was itself a form of unlawful discrimination in violation of article 8307c. On several occasions, management witnesses were asked whether it was true that, as the CBA seemed to state, injured workers who did not demand settlements could take eighteen months to return to work without losing their places in the plant, while injured workers who did demand such settlements would have to be able to come back to work immediately or lose their jobs. On each occasion, the witnesses conceded that this was an accurate statement of management policy, although they denied that this constituted retaliation. Respondent put on other evidence to try to show that it did its best to accommodate injured workers, whether or not they sought workers' compensation benefits. This evidence, in turn, was disputed by petitioner.

After a three-day trial, the jury returned a verdict of $60,000 in favor of petitioner and against respondent. Respondent then moved for judgment notwithstanding the verdict, in which it repeated its argument, made by motion to dismiss during the trial, that because petitioner was

attacking a discriminatory policy that was reflected in a CBA, his claim was preempted by section 301. This motion was denied without opinion by the district judge. App. 10a.

On appeal, respondent reiterated its contention that, by overtly attacking the CBA at trial, petitioner had transformed his state law claim into one that was completely preempted by section 301. Petitioner argued, for his part, that respondent could not shield an illegal employment policy from state law attack by the simple expedient of incorporating it into a CBA. The effect of respondent's preemption defense, petitioner pointed out, would be to permit employers to contract for something illegal under state law, in flagrant contravention of this Court's precedents in *Lingle v. Norge*, 486 U.S. 399 (1988), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

The Fifth Circuit reversed. It began by acknowledging that this Court has held that tort claims may be brought by employees against employers so long as the state law claim is not "inextricably intertwined" with consideration of the terms of the CBA. App. 5a. It also recognized that, in some circumstances, an employee may proceed on a claim of retaliatory discharge under art. 8307c without running afoul of section 301 preemption, because such a claim depends on the employer's motive for the discharge, and the question of motive is normally independent of the CBA. *Id.* 7a. But here, the court decided, "Medrano was essentially challenging the very legality of Article XVII, Section 11(F), of the CBA, which Excel had faithfully applied and which was the basis for Medrano's termination." *Id.* The case was thus deemed unlike the situation in other retaliatory discharge cases, which turn on the legality of the motive for a single discharge. "What is disputed in this case is whether the **provision itself** was illegal or discriminatory." *Id.* 8a (emphasis in original). Citing a Fifth Circuit precedent that forbade state law claims directed against the enforcement of provisions of a CBA, the court concluded that it was impossible to decide whether the

provision itself was illegal without examining the provision, and such examination caused the state law claim to be preempted by section 301. *Id.* The court did not, however, explain what forum would be available to hear the claim that the CBA violated state law, in light of the limitations placed by the CBA itself on the authority of an arbitrator to resolve contractual grievances.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Prior Decisions of This Court Holding That Employers May Not Use Collective Bargaining to Contract For What Is Illegal Under State Law, and the Lower Courts Are in Broad Disarray In Determining How Much Examination of Collective Bargaining Agreements Requires a Finding of Preemption Under Section 301

1. This Court has held that all claims that seek to enforce a collective bargaining agreement arise under section 301 of the LMRA, even if the plaintiff purports to bring the claim under state law. *Avco Corp. v. Machinists*, 390 U.S. 557 (1968); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court ruled that an employee cannot avoid the preemptive effect of section 301 simply by using a tort label to describe a claim that, in effect, seeks to enforce duties created by a CBA.

But *Allis-Chalmers* also insisted that the mere fact that an employer has entered into a CBA to govern its employees' terms and conditions of employment does not serve to immunize the employer from claims seeking to enforce state law rights that are independent of any right established by contract. 471 U.S. at 212. Section 301 did not "give the substantive provisions of private agreements the force of

federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Id.* Nor must the state claim be completely unrelated to the CBA; it must only be "sufficiently independent of the CBA to withstand to pre-emptive force of § 301." *IBEW v. Hechler*, 481 U.S. 851, 859 (1987).

In *Lingle v. Norge,* 486 U.S. 399 (1988), the Court made clear the limits of the preemption doctrine enunciated in *Allis-Chalmers*. Some lower courts had understood *Allis-Chalmers* to stand for the proposition that any state law claim brought by a unionized employee was necessarily dependent on the CBA, if there existed parallel rights in the CBA and a grievance procedure for enforcing them. In *Lingle*, as in this case, the employee claimed that she had been fired for exercising her right to file a workers' compensation claim, and the Court held that the mere existence of a CBA with an arbitration clause was not sufficient to preclude the states from providing an independent cause of action to employees who were terminated for a reason deemed by the state to be contrary to public policy. The Court held that state law tort claims are preempted only to the extent that they are dependent on the meaning of a CBA, and the fact that a CBA may contain a clause that provides rights parallel to the state claim does not make the state law claim "dependent" on the CBA. 486 U.S. at 408-410. The Court went on to observe that it was possible for a state law claim to require some reference to a CBA without being preempted:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a CBA and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but

> the state law analysis would not thereby be preempted.
>
> 486 U.S. at 413 n.12.

The decision below construes *Lingle*'s statement of the standard for determining whether a state law claim is preempted by section 301, as **eliminating** *Allis-Chalmers*' insistence that section 301 does not enable employers to use a union contract to override state law regulations with which they disagree. Although this confusion is shared by many courts, *see* Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 593-620 (1992), it is plainly not what the *Lingle* Court intended. Indeed, *Lingle* was the first case in which this Court held a state law claim **not** preempted by section 301, and it did so by cutting back the expansive view of preemption adopted by many lower courts.

Under the decision below, employers that are forbidden by Texas law from discriminating against workers' compensation claimants may insulate themselves from retaliatory discharge claims by writing provisions allowing discrimination into their CBA's; under that analysis, no party may sue under state law to challenge the lawfulness of such provisions. And, because the CBA here, like most CBA's, limits the arbitrator to construing the CBA itself, and does not give him license to base his decision on public law that may contradict the agreement, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974), there is no forum to which an employee may bring his claim that the CBA violates state law.

This Court has long held that the system of collective bargaining concerning the terms and conditions of employment does not supplant minimum employment standards that the states may choose to impose. *E.g.*, *Terminal RR Ass'n v. Brotherhood of RR Trainmen*, 318 U.S.

1, 6-7 (1943); *Malone v. White Motor Corp.*, 435 U.S. 497, 504-505 (1978). The Fifth Circuit's contrary ruling threatens to expose all such state laws to preemption whenever an employer is able to overrule them in a CBA. The Court should grant certiorari in this case to protect the rights of the states to legislate free of private veto.

2. In cases of preemption, "the ultimate touchstone" is Congressional intent. *Allis-Chalmers, supra*, 471 U.S. at 208. Given the respect due the states in our federal system, there is a strong presumption against finding Congressional intent to preempt state law, "unless that is the clear and manifest purpose of Congress." *Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981). However, not only did the court below fail to consider whether Congress intended to preclude Texas from providing a cause of action against retaliatory discharge to a worker whose CBA permitted such retaliation, but in fact there is strong evidence that Congress did not so intend.

The basis for preempting petitioner's state cause of action was that the respondent "had faithfully applied" its CBA, and a state law claim may not be brought to challenge the legality of a provision of a CBA. App. 7a. If one of the questions in the case was whether respondent had, in fact, faithfully applied the CBA, it would be wholly natural to construe section 301 to preempt at least that part of the state claim, and maybe all of it, because section 301 makes suits "for **violation** of" CBAs a question of federal law. But the mere fact that a state law may **invalidate** a provision of a CBA is no basis for finding preemption by section 301.

In fact, many federal statutes forbid retaliatory discharge and otherwise regulate the treatment of employees, and, either by their express terms or under longstanding interpretations, those laws override contrary provisions in private agreements, either collective or individual. *E.g.*,

Jewell Ridge Coal Corp. v. UMW Local 6167, 325 U.S. 161, 167 (1945) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (Title VII of the Civil Rights Act of 1964); *Laffey v. Northwest Airlines*, 567 F.2d 429, 447 (D.C. Cir. 1976) (Equal Pay Act). The same Congress that enacted section 301 in 1947 also passed the Selective Service Act of 1948, whose protections for the reemployment of veterans could be enforced by civil actions even contrary to claims that other workers might assert under CBAs. Pub. L. No. 62-759, Title I, § 9, 62 Stat. 614-618. Congress has also been scrupulous to avoid federal preemption or other disruption of state workers' compensation systems. *E.g.*, Occupational Safety & Health Act, 29 U.S.C. § 653(b)(4); Employee Retirement Income Security Act, 29 U.S.C. § 1003(b); 28 U.S.C. § 1445(c) (barring removal of workers' compensation claims); 26 U.S.C. § 104(a)(1) (excluding workers' compensation benefits from taxable income).

State workers' compensation laws similarly forbid private agreements, whether collective or otherwise, from overriding the workers compensation system. 4 Harper, James & Gray, *The Law of Torts* § 21.6 at 253 (2d ed. 1986); Texas Rev. Civ. Stat. Ann., art. 8308-3.09. Indeed, it was a concern that the threat of retaliatory discharge might grow into a device to compel employees to reassume the risks of industrial accidents that led many states to provide a cause of action in tort for retaliatory discharge and to forbid collectively bargained waiver of this right as well. *See Gonzalez v. Prestress Engineering Corp.*, 115 Ill.2d 1, 503 N.E.2d 308, 312 (1986). Texas was the first state to adopt a comprehensive approach to this problem, 2A Larson, *The Law of Workmen's Compensation* § 68.36(a), at 13-182 (1992), and one of the first to hold that claims could be pursued independent of the collectively bargained grievance procedure. *Richards v. Hughes Tool Co.*, 615 S.W.2d 196 (Tex. 1981); *Bonner v. Fleming Co.*, 734 S.W.2d 764 (Tex. App. 1987).

But the problem of preemption will not be limited to workers' compensation laws, if the Fifth Circuit's decision is permitted to stand. For example, many states, particularly within the Fifth Circuit, have laws -- so-called "Right to Work" legislation -- that forbid unions and employers from including in their CBA a union security clause that requires employees to join a union as a condition of employment. This subject has been the focus of bitter debate at both state and federal levels, and the National Labor Relations Act ("NLRA") allows some such agreements, but not others. 29 U.S.C. §§ 158(a)(3), 164(b). Yet under the preemption doctrine adopted by the Fifth Circuit here, a state law claim alleging that the employer has entered into a union security clause forbidden by that state's "Right to Work" law would be preempted by section 301 because the courts could not decide whether the clause was illegal without interpreting the clause.

Similarly, many states have civil rights laws that extend beyond the federal anti-discrimination statutes, such as by invalidating discrimination based on additional categories (such as family status or sexual orientation), or by extending protection to additional categories of employers (such as smaller businesses) and workers (such as persons with disabilities not recognized under the Americans with Disabilities Act). Existing precedent permits employees to challenge provisions of CBAs under such laws. *E.g.*, *Bald v. RCA Alascom*, 569 P.2d 1328 (Alaska 1977); *Franklin Mfg. Co. v. Iowa Civil Rights Comm.*, 270 N.W.2d 829 (Iowa 1978). *See also Beckwith v. United Parcel Service*, 889 F.2d 344, 346-348 (1st Cir. 1989) (Maine statute allowing challenge to payroll deductions expressly authorized by CBA, held not preempted by NLRA).

Under the Fifth Circuit's holding below, an employer that was able to persuade the union to endorse its prejudices would be able to insulate itself from review under state law. Indeed, the circuits are in disarray about the extent to which a claim under a state civil rights law may be pursued against

a unionized employer who asserts that the CBA provides the explanation for its action against the employee. *Compare O'Brien v. Conrail*, 972 F.2d 1 (1st Cir. 1992), *with O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989).

Accordingly, the decision below poses a severe threat to the right of states to protect their citizens against abuses by employers whose collective bargaining position is strong enough to win CBA provisions that purport to counteract state minimum employment standards. The Court should grant review to consider the important question of whether the preemptive effect of section 301 reaches that far.

3. The question of whether federal labor law, in conjunction with the "just cause" and comparable provisions contained in most collective bargaining agreements, preempts the application of general state laws against retaliatory discharges to unionized employees, is one that has vexed the lower courts and produced sharply conflicting results. For example, several courts have refused to preempt state law claims of retaliation for filing workers' compensation claims, brought by employees who were either discharged or laid off for their failure or inability to return to work within the time permitted by the CBA. *See Peabody Galion v. Dollar*, 666 F.2d 1309, 1312 (10th Cir. 1981); *Puchert v. Agsalud*, 677 P.2d 449, 452, 453-455 (Haw. 1984), *app. dism. for want of substantial federal question sub nom. Pan American World Airways v. Puchert*, 472 U.S. 1001 (1985). Similarly, in *Machinists District 190 v. Utility Trailer Sales Co.*, 141 Cal. App. 3d 80, 100, 190 Cal. Rptr. 98 (1983), *app. dism. for want of substantial federal question*, 464 U.S. 1005 (1983), the employee sued to enforce a state law requiring employers to indemnify employees for lost tools; the court refused to preempt the claim even though an arbitrator had held, rejecting the employee's grievance under the CBA, that the employer could decide not to provide such reimbursement. Not only do these cases stand in opposition to the ruling of

the Fifth Circuit here, but this Court's affirmances for want of a substantial federal question in *Utility Trailer* and *Puchert*, rejecting appeals in which the employers claimed preemptive power for the CBA, are themselves binding precedents with which the decision below conflicts.

The foregoing cases are pre-*Lingle* and (except *Puchert*'s affirmance) pre-*Allis-Chalmers*, but these two cases have not succeeded in putting an end to the differences among the lower courts on the question of distinguishing between state law claims that are and are not preempted under section 301. Thus, for example, the lower courts continue to grapple with the question of whether state claims are preempted when the employer raises the CBA as a defense to the otherwise independent state law claim. In such cases as *McCormick v. AT & T Technologies*, 934 F.2d 531, 536 (4th Cir. 199) (*en banc*), courts have indicated that an employer can secure the preemption of a state law claim by claiming that the CBA gave it the legal right to act against the employee. Similarly, in *Utility Workers v. Southern Calif. Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), the court held that a state privacy claim was preempted because the CBA had to be consulted to determine whether the union had bargained away the employees' privacy rights. As Professor Stone has observed, the effect of such decisions as these is to allow the mere assertion of a CBA-related defense to extinguish the state law right by "automatic[] preempt[ion]," with no check on the validity of the CBA-related claim. 59 U. Chi. L. Rev at 604, 606.

Other courts have firmly refused to permit the mere assertion of a CBA-related defense to cause the preemption of the underlying state cause of action, where it was decided that the state law claim could, at least in theory, be resolved without considering the CBA. *Pantoja v. Texas Gas & Trans. Corp.*, 890 F.2d 955, 960 (7th Cir. 1989); *Eldridge v. Felec*, 920 F.2d 1434, 1439 (9th Cir. 1990). And some courts have held that, even if a CBA-based defense might be available in theory, the CBA itself should be scrutinized to

determine whether such a defense is available. *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988), *after remand*, 906 F.2d 341 (8th Cir. 1990).

Still other courts have striven for a middle course, which would honor this Court's statement in *Lingle* that defenses dependent on the meaning of the CBA could be resolved by federal law procedures, while the basic state law claim would not be preempted. 486 U.S. at 413 n.12. Thus, one court remanded a case to arbitration to determine whether a CBA waived the state law right, stating that the state claim could proceed if this federal law procedure determined that the CBA defense was invalid. *Matter of Chicago, Milwaukee RR Co.*, 852 F.2d 960, 967-968 (7th Cir. 1988). *See also Dougherty v. Parsec*, 872 F.2d 766, 770-771 (6th Cir. 1989) (after arbitrator decided CBA not violated, court could decide remaining tort issues). Another court held that a state age discrimination claim could not be removed to federal court on complete preemption grounds, while indicating that, in the state court on remand, some issues in the case would be preempted by federal law. *Machinists v. General Electric Co.*, 713 F. Supp. 547, 554 (N.D.N.Y. 1989).

Petitioner's attack on the CBA was undertaken in anticipation of respondent's CBA defense. If, as many lower courts have held, the mere possibility of a CBA-related defense is not a sufficient reason to preempt a state law claim, then the fact that the CBA provision on which the defense is founded itself violates state law because it calls for the very retaliation or discrimination that the state forbids, should certainly not put the employer in a stronger position to contest the application of state law. In reviewing this case, therefore, the question of automatic preemption by CBA-related defenses will be well within purview of the Court's consideration.

Controversy has also arisen among the lower courts about whether claims for intentional infliction of emotional

distress are preempted. Many circuits have routinely held such claims preempted on the theory that a court cannot decide whether conduct was truly outrageous without determining precisely what the CBA allowed. *E.g.*, *McCormick v. AT&T Technologies Corp.*, 934 F.2d 531 (4th Cir. 1991) (*en banc*); *Johnson v. Beatrice Foods*, 921 F.2d 1015 (10th Cir. 1990). Other courts have adopted a more painstaking analysis, examining CBAs to determine whether they do, in fact, provide some justification for the employer's action, and consequently denying preemption of some intentional infliction claims. *E.g.*, *Galvez v. Kuhn*, 933 F.2d 773, 779-780 (9th Cir. 1991); *Hanks v. General Motors Corp.*, 906 F.2d 341 (8th Cir. 1990); *Knafel v. Pepsi-Cola Bottlers*, 899 F.2d 1473, 1483 (6th Cir. 1990).

Even state anti-discrimination laws have not always been held to be enforceable over claims of preemption. Thus, in *O'Brien v. Conrail*, 972 F.2d 1 (1st Cir. 1992), the court held that the CBA must be consulted to determine whether a disability discrimination plaintiff is qualified for particular jobs, and thus whether a prima facie case of discrimination can be established, citing decisions of several other lower courts taking the same position. By contrast, *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989), allows such claims to proceed

The broader questions identified above are not squarely presented here, and we do not suggest that this is the right case in which to resolve all of them. But this widespread disagreement shows that the lower courts are struggling to apply the preemption rules established by this Court in *Allis-Chalmers* and *Lingle*. In fact, courts and commentators alike have noted the highly confused state of preemption law in this respect. *E.g.*, *Galvez v. Kuhn*, 933 F.2d 773, 776 (9th Cir. 1991); Note, *The Need for a New Approach to Federal Preemption of Union Members' State Claims*, 99 Yale L.J. 209 (1989).

The time is ripe for the Court to revisit the issue of section 301 preemption. The preemption question here is narrow, because the CBA is relevant only because petitioner contends that it was contrary to state law. But what this case has in common with the issues presented in these other preemption controversies is the question whether **any** need to consult the CBA is sufficient to warrant preemption, or whether a claim is preempted only if the plaintiff is trying to enforce duties founded in the CBA itself. Thus, the case presents an opportunity to speak once more to the troubled area of section 301 preemption and to begin the process of laying the intra-circuit conflicts to rest.

CONCLUSION

The petition for a writ of certiorari should be granted.

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June 7, 1993

Miguel MEDRANO, Plaintiff-Appellee

v.

EXCEL CORPORATION,
Defendant-Appellant

No. 91-7385

U.S. Court of Appeals,
Fifth Circuit

March 9, 1993

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Appeal from the U.S. District Court for the Northern District of Texas.

Before JOLLY and WIENER, Circuit Judges, and FITZWATER, District Judge.*

JOLLY, Circuit Judge: -- This appeal presents a little twist in the basic question of whether a state claim for retaliatory discharge under workers' compensation law is pre-empted pursuant to a collective bargaining agreement. Our plaintiff and appellee, Miguel Medrano, sustained work-related injuries and filed two workers' compensation claims, both of which he settled. On the date of the settlement, he was still under medical restrictions relating to work duties

---

* District Judge of the Northern District of Texas, sitting by designation.

that could not be accommodated by his employer, Excel Corporation. Applying the terms of a collective-bargaining agreement (CBA), Excel terminated Medrano's employment. Medrano -- asserting diversity jurisdiction -- filed a wrongful discharge complaint against Excel. In his complaint, Medrano alleged that Excel discharged him in violation of article 8307c of the Texas Workmen's Compensation Act. Medrano alleged that Excel's alleged reliance on the CBA as the reason for discharge was a mere pretext, and that Excel really terminated him in retaliation for filing a workers' compensation claim. Things changed, however, at the outset of the trial. Once the trial began, Medrano argued that the provision of the CBA itself constituted discrimination in violation of article 8307c. Excel then argued to the district court that Medrano's claim, as presented at trial, was pre-empted by section 301 of the Labor Management Relations Act (LMRA). Excel was unsuccessful, however, in obtaining, first, a leave to amend its answer, and then in obtaining a directed verdict, a judgment notwithstanding the verdict (JNOV), or a new trial -- all based on federal pre-emption of Medrano's state law claim. The $60,000 jury verdict for Medrano was entered as the judgment of the court, and Excel appeals.

I

Excel employed Medrano as a butcher at its Plainview, Texas, meat packing plant in June 1989. During November of that year, Medrano suffered injuries to his left wrist, his right arm, and his right shoulder. As a result of his injuries, Medrano was unable to work for a substantial part of 1990. Medrano filed two workers' compensation claims and collected weekly compensation benefits.

Medrano returned to work on October 5, 1990, with the restriction that he could not use a knife or hook for more than 65% of the time. Medrano was still recovering from his shoulder injury, which restricted him to light duty for four months. On November 12, however, Medrano's doctor

determined that his current position was too stressful to his shoulder and further restricted Medrano's work conditions. On November 13, Medrano was medically prohibited from all use of knives or hooks. On November 28, 1990, Medrano settled his two workers' compensation claims for approximately $27,000.00. On this date, there were no jobs available at Excel that could accommodate[1] Medrano's medical restrictions.

On December 13, 1990, Medrano and thirty-seven other Excel employees filed suit against Excel, alleging harassment, discrimination, and retaliation in violation of Tex.Rev.Civ.Stat.Ann. art. 8307c, the Texas Workmen's Compensation Act. On January 11, 1991, Excel informed Medrano that his employment was terminated pursuant to Article XVII, Section 11(F), of the collective-bargaining agreement (CBA) between Excel and the United Food and Commercial Workers District Local #540. This settlement provision states that an employee shall lose his seniority for full settlement for a disability that the company cannot accommodate. The district court subsequently severed the claims of the thirty-eight plaintiffs in the previously filed lawsuit. Medrano amended his complaint, dropping the harassment claim.

Medrano's retaliatory discharge action was tried before a jury. On the second day of trial, Excel moved for leave to file a trial amendment asserting that Medrano's claim was pre-empted by federal labor law. Medrano's complaint alleged that the settlement provision in effect when he settled his workers' compensation claims was merely a pretext for his termination; instead, Excel had terminated him in retaliation for exercising his rights under the Texas

---

[1] Specifically, Article XVII, Section 11(F), provides that "[a]n employee shall lose his seniority for the following reasons: Full settlement with an employee for a disability that the Company cannot accommodate."

Workmen's Compensation Act. Excel argued, however, that beginning with the trial, Medrano had changed his position: He was now arguing that the settlement provision of the CBA itself constituted discrimination against employees who settled their workers' compensation claims. This claim, Excel argued, was pre-empted by section 301 of the Labor Management Relation Act (LMRA). Excel's motion to plead pre-emption, however, was denied. At the close of Medrano's case-in-chief, Excel moved for a directed verdict, again arguing that Medrano's claim -- as presented at trial -- was pre-empted by federal law. The district court, however, rejected Excel's argument.

On October 25, 1991, the jury found for Medrano. It concluded that Excel had terminated Medrano in retaliation for his pursuit of workers' compensation benefits. On November 8, 1991, Excel filed motions for a JNOV and for a new trial, again arguing that Medrano's claim was pre-empted by section 301; again, both motions were denied by the district court. On November 26, 1991, the district court entered judgment in favor of Medrano in the amount of $60,000.00. Excel appeals.

II

On appeal, Excel raises three issues. First, Excel argues that Medrano's claim of retaliation, as presented to the jury, was pre-empted by section 301 of the LMRA. Second, Excel argues that Medrano failed to present evidence to support the jury's verdict. Third, Excel argues that Medrano failed to present evidence to support an award of exemplary damages.

On the other hand, Medrano first argues that Excel has failed to preserve its claim of pre-emption for appeal; if the issue has been preserved, Medrano argues that his claim is not pre-empted. Medrano also defends his jury award against Excel's evidentiary attack.

III

A

Section 301 of the LMRA states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Any state law cause of action for violation of a collective-bargaining agreement is entirely displaced by federal law under section 301. *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 368, 110 S.Ct. 1904, 1909, 109 L.Ed.2d 362 (1990). Furthermore, state law is pre-empted by section 301 "in that only the federal law fashioned by the courts under section 301 governs the interpretation and application of collective-bargaining agreements." *Id.* A tort claim "inextricably intertwined" with consideration of the terms of the collective-bargaining agreement contract is pre-empted under section 301. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213,105 S.Ct. 1904, 1912, 85 L.Ed.2d 206 (1985). If, however, the state-law claim can be resolved without interpreting the collective-bargaining agreement itself, the claim is independent of the agreement for section 301 pre-emption purposes. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410, 108 S.Ct. 1877, 1883, 100 L.Ed.2d 410 (1988).

B.

Medrano's claim against Excel was for wrongful discharge under article 8307c of the Texas Workmen's Compensation Act, which provides in part:

> Protection of claimants from discrimination by employers; remedies; jurisdiction
>
> Section 1. No person may discharge or in any other manner discriminate against any employee

> because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Tex.Rev.Civ.Stat.Ann. art. 8307c, Acts 1971, 62nd Leg.p.884, ch. 115. In a case pursuant to article 8307c, the employee bears the initial burden of establishing a causal link between the discharge and the workers' compensation claim. *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 562 (5th Cir. 1992). Retaliation only needs to be a determining factor for discharge to permit an employee to recover under article 8307c. *Id.* Once the employee has established the causal link, the employer must rebut the alleged discrimination by showing a legitimate reason for the discharge. *Id.*

C

In this case we are asked to "determine if (Medrano's) claim is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of section 301." *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 481 U.S. 85, 859, 107 S.Ct. 2161, 2167, 95 L.Ed.2d 791 (1987).[2] We

---

[2] We quickly dismiss of Medrano's argument that Excel did not preserve this issue for appeal. Excel moved for a directed verdict at the close of Medrano's evidence, and also argued in its motion for JNOV or new trial that Medrano's claim was pre-empted by section 301. Therefore, Excel "properly preserved the issue" of pre-emption for appeal. *Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d. 1023, 1028 (5th Cir. 1992).

conclude that it is not. Although this holding may at first appear somewhat at odds with our holdings in *Jones v. Roadway Express, Inc.* (*Roadway Express I*), 931 F.2d 1086 (5th Cir. 1991), and *Jones v. Roadway Express, Inc.* (*Roadway Express II*), 936 F.2d 789 (5th Cir. 1991), and the Supreme Court's holding in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), an examination of the cases demonstrates the distinction. The state-law claim in *Roadway Express I*, as in the instant case, was based on article 8307c. In *Roadway Express I*, we stated that "the basic issue in this case is whether a retaliatory discharge occurred" and concluded that "[r]esolution of this issue does not require an interpretation of the CBA." *Roadway Express I*, 931 F.2d at 1090. We held that because the retaliatory discharge claim was not "inextricably intertwined" with the CBA and did not depend upon a provision of the CBA, the state law claim was not preempted. *Roadway Express II*, 936 F.2d at 792. Furthermore, we observed that in the "typical case" involving such a retaliatory discharge, the claim could be resolved without an interpretation of the CBA. *Id.*

The case before us today, however, is not a typical straightforward case alleging a retaliatory discharge in violation of article 8307c. Unlike the plaintiff's claim in *Roadway Express I and II*, Medrano's claim is indeed inextricably intertwined with a consideration of the terms of the CBA. Medrano actually drew on the settlement provision of the CBA itself to establish a violation of article 8307c. Medrano's claim is distinctive in that he alleged Excel -- by applying a specific provision of the CBA -- discriminated against him because he *settled* a workers' compensation claim, not because he *filed* one. Throughout trial, Medrano drew a distinction between those employees who filed a workers' compensation claim but did not settle (not discharged), and those who filed a claim but did settle (discharged). Medrano was essentially challenging the very legality of Article XVII, Section 11(F) of the CBA, which

Excel had faithfully applied and which was the basis for Medrano's termination. Medrano's claim, without a doubt, is substantially dependent upon the meaning of a term of the CBA and its applicability in this case.

In *Lingle* the Court concluded that the "purely factual questions" necessary to show retaliatory discharge in that case "pertain[ed] to the conduct of the employee and the conduct and motivation of the employer." *Lingle*, 486 U.S. at 407, 108 S.Ct. at 1882. The Court reasoned that the plaintiff's state law retaliatory discharge claim was independent of the CBA because "resolution of the state-law claim [did]not require construing the collective-bargaining agreement." *Id.* To the contrary here -- and we repeat ourselves -- Medrano's claim clearly requires construing the CBA. The unquestioned basis of Excel's discharge of Medrano was the settlement provision of the CBA; that point is not in dispute. What is disputed in this case is whether the *provision itself* was illegal or discriminatory. Unlike the facts presented in *Lingle*, here the CBA must be construed for resolution of Medrano's state law claim. "No matter in what glamorous garb it is dressed, the basic thrust" of Medrano's claim is that the enforcement of the settlement provision of the CBA "itself constitutes a tort under state law." *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985).[3]

At trial, Medrano acknowledged that he was discharged pursuant to the settlement provision of the CBA, but argued that this provision itself constituted discrimination against employees who settle their claims. In essence, Medrano's claim was that Article XVII, Section 11(F), of the

---

[3] We find our recent decision in *Bagby v. General Motors Corp.*, 976 F.2d 919 (5th Cir. 1992), to be applicable to this case. In *Bagby* we concluded that when a plaintiff "asserts that acts unquestionably taken in accordance with the provisions of the CBA were nonetheless tortious," such "claims will obviously require an interpretation of the CBA." *Id.* at 921-22.

CBA was an admission by Excel that it discriminated against Medrano in violation of article 8307c because this section of the CBA allowed Excel to discriminate against any workers' compensation claimant who settled his claim while Excel was unable to accommodate him at work. Throughout the trial, Medrano referred to this provision of the CBA and attempted to show the jury that Excel discriminated not only against Medrano individually but against any employee who settled a workers' compensation claim as opposed to an employee who did not.

Medrano's attorney began his attack on the settlement provision of the CBA during voir dire[4], and his challenge to the CBA continued during opening statements. Medrano called six witnesses, three of whom were questioned extensively about the terms of the CBA. Excel called only three witnesses, but on cross-examination Medrano's attorney again concentrated on the terms of the CBA. Even during his closing arguments, Medrano's attorney's emphasis was on the CBA. Medrano was not challenging the actions of his employers under section 8307c; instead, he was challenging a provision of the CBA that was applied by his employer. Because the solution of Medrano's claim required an interpretation of the CBA, his claim was clearly pre-empted by section 301.

REVERSED.

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[4] Medrano's attorney told prospective jurors that "[y]ou are going to be asked to consider whether this rule [Article XVII, Section 11(F)] violates the law, and I think the evidence will show plainly it does. And I ask you, just because there was a union contract involved where they managed to get it in the contract, that would it keep you from fairly considering the *issue* at hand, which is *whether that rule discriminates* against employees that settle claims." (Emphasis added.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

MIGUEL MEDRANO	§	
	§	
v.	§	NO. CA5-91-080-C
	§	
EXCEL CORPORATION	§	

ORDER

On this day came to be considered Defendant's Motion for Judgment Notwithstanding the Verdict. After considering the Motion the Court finds that the Motion should be **Denied**.

It is so ordered.

Nov. 26, 1991 /s/ Sam R. Cummings
JUDGE PRESIDING

(2)

Supreme Court, U.S.
FILED
JUL 8 1993
OFFICE OF THE CLERK

No. 92-1937

In The

Supreme Court of the United States

October Term, 1993

MIGUEL MEDRANO,

Petitioner,

v.

EXCEL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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July, 1993

BEST AVAILABLE COPY

QUESTION PRESENTED

Is an employee's state-law claim alleging retaliatory discharge for settling a workers' compensation claim preempted by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, when the state-law claim is founded on the allegation that the provision of the collective bargaining agreement under which the employee was terminated is itself illegal and discriminatory, and when the alleged discrimination is a deprivation of rights found only in another provision of the collective bargaining agreement?

LISTING OF PARTIES IN THE COURT BELOW

The names of all parties to the proceeding in the Court of Appeals appear in the caption of the case. Excel Corporation is a wholly-owned subsidiary of Cargill, Incorporated.

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No. 92-1937

In The

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October Term, 1993

MIGUEL MEDRANO,

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v.

EXCEL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Rule 15 of the rules of this Court, respondent Excel Corporation submits this brief in opposition to petitioner Miguel Medrano's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition"). The opinion of the Court of Appeals is reported at 985 F.2d 230 and is reproduced in the appendix to the Petition. The relevant statutes, Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), and Article 8307c of the Texas Revised Civil Statutes, are set forth in the Petition, at 2-3.

COLLECTIVE BARGAINING AGREEMENT

Petitioner's employment was governed by a collective bargaining agreement between Excel Corporation, Plainview, Texas, and United Food and Commercial Workers District Local #540 (the "CBA"). Article XVII, Section 11, of the CBA provides as follows:

> **Section 11:** An employee shall lose his seniority for the following reasons:
>
> A. Voluntary quitting (if an employee is absent from work three (3) or more consecutive days without notifying the Company or without good cause, he will be deemed to have voluntarily terminated his employment).
>
> B. Discharge for cause.
>
> C. Failing to report at the expiration of a leave of absence without good cause.
>
> D. Absence from work for any reason for a period of more than eighteen (18) months.
>
> E. Employees recalled from layoff under the provisions of Section 4 (G) will have five (5) working days to return to work after being notified by certified letter or telegram return receipt requested, sent to their last known address. Employees failing to report within five (5) working days of the date the letter or telegram is sent will lose their seniority. An additional five (5) days will be granted if requested by the employee within the first five (5) days.
>
> F. Full settlement with an employee for a disability that the Company can not accommodate.

STATEMENT OF THE CASE

Pursuant to Rules 15.1 and 24.2 of the rules of this Court, respondent respectfully points out the following additions and corrections to petitioner's statement of the case.

A. Facts.

Respondent submits the following chronology, which it believes provides a more accurate and complete summary of petitioner's pertinent employment and injury history than that set forth in the Petition.

June 1989	Petitioner first employed by respondent. Statement of Facts ("S.F.")[1] at 240.
November 3, 1989	Petitioner injured his left wrist. S.F. at 246.
November 6, 1989	Petitioner injured his right arm and shoulder. S.F. at 246.
November 21, 1989	Petitioner reinjured his right arm and shoulder. *Id.*
November 1989	Following his injuries, petitioner stopped working, filed two workers' compensation claims, and collected weekly compensation benefits. S.F. at 247, 253.

[1] The Statement of Facts ("S.F.") is the transcript of trial proceedings, which was filed as part of the record in the Court of Appeals.

October 5, 1990	Petitioner returned to work with restrictions that temporarily limited use of his wrist and shoulder. S.F. at 247-48. Respondent testified that it attempted to accommodate these restrictions by giving petitioner the position of the "third man" on what is ordinarily a two-person job. S.F. at 207-08. However, petitioner continued to experience problems with his shoulder and wrist. S.F. at 208.
November 12, 1990	Petitioner saw his shoulder doctor, who gave him more severe restrictions on use of his shoulder and advised him that he needed a new job, because his old job was too stressful on his shoulder. S.F. at 209.
November 13, 1990	Petitioner saw his wrist doctor, who severely restricted use of his wrists. S.F. at 209-10. The combination of his shoulder restrictions and his wrist restrictions prevented petitioner from performing any job at the plant, and he was taken off work. S.F. at 210.
November 28, 1990	Petitioner settled the two workers' compensation claims in connection with his November 1989 injuries for a lump sum of approximately $27,000. S.F. at 252-53. At the time of

	settlement, respondent had no jobs available within petitioner's medical restrictions. S.F. at 214-15.[2]
January 11, 1991	Respondent's safety director and the union steward each testified that they informed petitioner on this date that he was being discharged pursuant to Article XVII, Section 11(F), of the CBA. S.F. at 65, 94-95, 334-36.
January 15, 1991	Petitioner received and sought to present to respondent modified medical restrictions. S.F. at 233.

B. Proceedings Below.

1. Petitioner's attack on the legality of the CBA was a novel, offensive tactic.

Petitioner states that:

> Rather than waiting for respondent to put its CBA-based defense before the jury, petitioner met the defense head-on in his case-in-chief,

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[2] Petitioner's statement that "[t]he evidence was conflicting" on this point (Petition at 4) is incorrect. There was no evidence that respondent had jobs available on the date of settlement that could have been performed by a person with petitioner's medical restrictions. The Court of Appeals specifically found that, on the date of petitioner's settlement, "there were no jobs available at Excel that could accommodate Medrano's medical restrictions." *Medrano v. Excel Corp.*, 985 F.2d 230, 231 (5th Cir. 1993).

> arguing that respondent's general policy regarding the reinstatement of injured workers, based on whether they demanded workers' compensation settlement, was itself a form of unlawful discrimination in violation of article 8307c.

Petition at 5. This statement inaccurately characterizes petitioner's trial strategy as an attempt at anticipatory rebuttal to respondent's defensive posture. Such a characterization mistakenly implies that respondent's CBA defense was the reason the claim was preempted.

Petitioner's argument that the CBA was illegal and discriminatory was not a rebuttal position, but was in reality a new, aggressive theory of liability. This novel strategy had not been revealed in petitioner's pleadings or in discovery, and it was clearly propounded at trial to avoid the inevitable failure of petitioner's pleaded "pretext" theory of the case.

Petitioner's case was the second of some forty companion cases that were pending for trial seriatim in the autumn of 1991. Each of those cases had been pleaded on the theory that the plaintiff had been fired in retaliation for filing a workers' compensation claim and that respondent's defense of the terminations, based on various provisions of the CBA, was mere pretext. The pretext theory had proved unsuccessful just days earlier, when the first of the companion cases, *Calvillo v. Excel Corp.*, No. CA5-91-075-C (N.D. Tex. 1991), which was premised on the very same provision of the CBA, resulted in a finding of no liability for respondent.

When he launched his attack on the CBA in voir dire and opening statement, petitioner was responding to this

failure of his initial theory, not to respondent's consistent defense theory. It was petitioner's charge, in his own words, that the CBA "was itself a form of unlawful discrimination," Petition at 5, that raised the issue requiring preemption of this case.

2. Respondent's actions were governed by the CBA.

Petitioner's statement of the case continues, stating:

> On several occasions, management witnesses were asked whether it was true that, as the CBA seemed to state, injured workers who did not demand settlements could take eighteen months to return to work without losing their places in the plant, while injured workers who did demand such settlements would have to be able to come back to work immediately or lose their jobs. On each occasion, the witnesses conceded that this was an accurate statement of *management policy*, although they denied that this constituted retaliation.

Petition at 5 (emphasis added). The testimony of Excel's management witnesses is clear and unambiguous – none testified that the situation summarized by petitioner above was "an accurate statement of management policy." Instead, every management witness testified that the CBA required termination of employees who settled claims on the basis of disabilities that prevented them from returning to work. *See, e.g.*, S.F. at 46, 145. The distinction between "management policy" and a negotiated provision of the CBA is obvious and significant. This procedure was not some arbitrary path followed by Excel

management to the detriment of its employees. On the contrary, it was the path dictated by the representatives of management and the Union as a result of the collective bargaining process, representing a legitimate effort to serve the interests of all Excel employees.

3. Respondent has not conceded that the CBA is discriminatory.

Petitioner asserts that respondent, in its motion to dismiss at trial and in its motion for judgment notwithstanding the verdict, argued that petitioner's claim was preempted "because petitioner was attacking a discriminatory policy that was reflected in a CBA." Petition at 5-6. Respondent has never argued – but rather has consistently denied – that Article XVII, Section 11(F), is unlawfully discriminatory.

SUMMARY OF ARGUMENT

Petitioner's claim is clearly preempted by federal law. The Court of Appeals correctly held that, by challenging the legality of the CBA, petitioner had brought his claim squarely within Section 301's preemptive scope. This Court has addressed this issue directly, holding that a retaliatory discharge claim must be decided under federal law if the claim requires an interpretation of a collective bargaining agreement. Here, as the Court of Appeals found, the CBA must be construed for resolution of petitioner's state-law claim. Petitioner has asserted no basis for respondent's liability other than the alleged conflict between the CBA and Texas law. However, the disputed provision of the CBA has never been held to be unlawful,

and is not retaliatory or discriminatory on its face. Thus, any determination of the legality of the CBA must be governed by federal labor-law principals.

This Court's holdings in *Lingle* and *Allis-Chalmers*, as applied by the Court of Appeals here, will not permit employers and unions to override state laws through collective bargaining as petitioner claims. Federal labor law provides an adequate remedy for such attempts. The Court of Appeals did not hold that state-law retaliatory discharge claims are preempted when the discharge can be shown to be unlawful without interpretation of the labor contract. Thus, the decision below does not compel preemption when a collective bargaining agreement provision, on its face, violates state law. Even where, as here, the need to interpret the collective bargaining agreement requires preemption, the contract may be invalidated under federal law; and state law may be employed to guide the formulation of federal policy in the arbitral and judicial process.

Finally, this is not an appropriate circumstance, as petitioner posits, for this Court to "speak once more" to the proper scope of preemption under Section 301. This Court has directly addressed and clearly defined the scope of preemption in cases alleging wrongful discharge for filing a workers' compensation claim. Further review of this case will not assist lower courts struggling to determine the outer boundaries of Section 301's preemptive field, because this case sits squarely at the center of that field. This case does not raise the issue of whether a state-law claim is preempted when the employer asserts a defense under the collective bargaining agreement or when the collective bargaining agreement, on its face,

violates state law. Moreover, the state-law claim asserted here not only requires an interpretation of the CBA provision alleged to be unlawful; it also requires *enforcement* of yet another CBA provision, a situation even petitioner acknowledges to be within the preemptive field. Accordingly, this case is not an appropriate vehicle for defining the outer limits of preemption in the workers' compensation context, much less in the broader areas suggested in the Petition.

ARGUMENT AND AUTHORITIES

A. The Court of Appeals Correctly Held that Petitioner's Claim Falls Within the Preemptive Scope of Section 301.

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("Section 301") "authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957). "[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). When the resolution of a state-law claim depends upon the analysis of a term of a collective bargaining agreement, "the application of state law . . . is preempted [by Section 301] and federal labor-law principals – necessarily uniform throughout the nation – must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). In such a case, the "claim must either be treated as a § 301 claim or dismissed as preempted by federal labor-contract law." *Allis-Chalmers*

Corp. v. Lueck, 471 U.S. 202, 220 (1985) (citations omitted). To determine whether a state-law claim is preempted, it must be determined whether evaluation of the claim "is inextricably intertwined with consideration of the labor contract." *Id.* at 213. A state-law remedy is "independent" of the collective bargaining agreement for Section 301 preemption purposes if, and only if, "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle*, 486 U.S. at 407. On the other hand, Section 301 requires preemption when provisions of the collective bargaining agreement "govern, or reasonably might be construed as governing," the claim. *Wells v. General Motors Corp.*, 881 F.2d 166, 174 (5th Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

From these tenets, a single governing principle emerges: a plaintiff's state-law retaliatory discharge claim will be preempted where resolution of the case depends upon interpretation of a term of the collective bargaining agreement. *See Lingle*, 486 U.S. at 407. This straightforward principle governed the Court of Appeals' review of this case. *See Medrano v. Excel Corp.*, 985 F.2d 230, 234 (5th Cir. 1993). It also provides the standard for analysis of the single question relevant to petitioner's claim before this Court: does petitioner's allegation that the relevant provision of the CBA is itself unlawful depend upon interpretation of a term of the CBA? Under the facts of this case, the correct answer, and the answer reached by the Court of Appeals, is that it does.

It is undisputed that petitioner was discharged pursuant to a provision of the CBA, and petitioner offered no basis for a finding of liability other than the alleged

illegality of the CBA provision itself. However, the disputed CBA provision has never been determined to be unlawful and is not, on its face, violative of state law. Consequently, interpretation of the CBA is essential to a resolution of petitioner's claim.

1. Respondent's liability is contingent upon a determination that the CBA violates state law.

Although his pleadings accused Excel of using the CBA as a "pretext" for discharging him in retaliation for exercising his rights under Texas workers' compensation laws (*see* Second Amended Complaint, Record at 189-92, ¶¶ VI-VII), petitioner abandoned his pretext argument at trial, arguing instead that Article XVII, Section 11(F), of the CBA itself constitutes discrimination against all employees who settle workers' compensation claims.

Petitioner's trial attorney told prospective jurors during voir dire that they would "be asked to consider whether *this rule* [Article XVII, Section 11(F)] violates the law" and whether the fact that the provision was contained in a "union contract" would keep them "from fairly considering *the issue* at hand, which is *whether that rule discriminates* against employees that settle claims." S.F. at 8-9, quoted by the Court of Appeals, *Medrano*, 985 F.2d at 234 n.4 (emphasis by Court of Appeals). Petitioner's attack on the CBA continued throughout trial and during closing argument. As the Court of Appeals concluded, "Medrano was not challenging the actions of his employers under section 8307c; instead, he was challenging a provision of the CBA that was applied by his employer." *Id.* at 234.

Petitioner does not dispute that conclusion. Moreover, he no longer disputes the Court of Appeals' conclusion that respondent "faithfully applied" the CBA and that Section 11(F) was "the basis for [petitioner's] termination." *Id.* Not a single witness, including petitioner himself, testified that he was discharged in retaliation for settling a workers' compensation claim, and no document supports that conclusion. Petitioner simply offered no evidence to support a finding of discrimination apart from the allegedly illegal and discriminatory CBA provision.

2. Section 11(F) does not, on its face, violate state law; thus, it must be interpreted.

Article XVII, Section 11(F), of the CBA provides that an employee "shall lose his seniority for . . . full settlement . . . for a disability that the Company can not accommodate." Record at 359. Petitioner assumes that Section 11(F) is unlawfully discriminatory under Texas workers' compensation law, and complains that an illegal contract should not be permitted to preempt his state-law claim. Respondent acknowledges that "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers*, 471 U.S. at 212. But no determination has ever been made that Section 11(F) is discriminatory or retaliatory or unlawful; and no such determination can be made from the face of the CBA.

Petitioner offered no evidence that Section 11(F) had a retaliatory purpose. Indeed, the undisputed testimony was to the contrary. S.F. at 408-09, 415-16. The trial court

was not asked to make a determination that, as a matter of law, the provision was unlawful or discriminatory, nor has any other tribunal made such a finding.

Petitioner argues that the effect of Section 11(F), when applied in conjunction with Section 11(D), is to treat employees who settle their compensation claims for a lump sum differently from those who do not settle their claims, but continue to collect weekly workers' compensation benefits. Those who do not settle claims are allowed 18 months to recuperate, while those who accept a full settlement of their claims must be ready to return to work based on their medical status at the time of settlement. Petition at 4, 5. Not every difference in treatment, however, is an unlawful discrimination.

Petitioner's claim does not fall into one of the four categories proscribed by article 8307c. Article 8307c prohibits an employer only from discharging or otherwise discriminating *against* an employee

> because the employee has in good faith [1] filed a claim, [2] hired a lawyer to represent him in a claim, [3] instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workman's Compensation Act, or [4] has testified or is about to testify in any such proceeding.

Tex. Rev. Civ. Stat. Ann. art. 8307c, Section 1 (Vernon Supp. 1993). "Unless one of the four specific circumstances listed in article 8307c motivated the employer in discharging or discriminating against an employee, that employee cannot prevail in an action based on article 8307c." *Swearingen v. Owens-Corning Fiberglas Corp.*, 968 F.2d 559, 563 (5th Cir. 1992). Section 11(F) does not deal

directly or indirectly with any of these acts. As the Court of Appeals made clear, petitioner alleged that respondent "discriminated against him because he *settled* a workers' compensation claim, not because he *filed* one." *Medrano*, 985 F.2d at 233 (emphasis in original).

Here, the alleged discrimination is between two sets of employees, each of which is collecting workers' compensation benefits. Employees in one set are collecting weekly benefits while restricted from working; the others have settled their claims for lump sums in lieu of continued weekly benefits. Respondent submits that the CBA, including Section 11(F), which was negotiated between itself and the union representing its employees, fairly adjusts the interests of all employees and is neither retaliatory nor discriminatory.[3]

This can be demonstrated by the example of petitioner himself. Petitioner had been receiving benefits of $184 per week since November 1989. S.F. at 253. On

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[3] "The collective agreement covers the whole employment relationship. It calls into being a new common law of a particular industry or of a particular plant." *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960). Our national labor policy is built on the belief that, by pooling their economic strength and bargaining as a group, workers can improve their conditions according to the group's priorities. *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). With this policy as a background, it is important to consider the agreement as a package, refined through the give and take process of bargaining to serve both sides. Thus, no single provision should be dismissed as inadequate without considering the fairness of the whole and the offsetting advantages gained through other provisions. *See Gardiner v. Sea-Land Service, Inc.*, 786 F.2d 943, 948-49 (9th Cir. 1986).

November 28, 1990, however, he settled his hand and shoulder claims for a total of $27,000. S.F. at 253. This amount is equivalent to about three years of weekly benefits. Because settlements ordinarily are made when an employee has reached "maximum recovery,"[4] the reasonable expectation would have been for petitioner's disability to have continued long past the time his employment would have terminated under the 18-month provision of the CBA. If that expectation had been fulfilled, petitioner and his counterpart collecting weekly benefits (hereinafter "Employee W") would have essentially equal overall benefits and income from Excel.

In reality, however, the medical prognosis on which petitioner settled his claim turned out to be drastically inaccurate, and, within six weeks from the date of his settlement, he was released to return to work with minimal restrictions. Under Section 11(F), petitioner was discharged based on his disability at the time of settlement. Thus, petitioner was left with his $27,000 and the choice of re-applying at Excel (*see* S.F. at 414-15), seeking work elsewhere, or taking a year and a half or so to consider

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[4] Prior to January 1, 1991, the general rule was that an employee was required to have achieved maximum recovery before the Industrial Accident Board would approve the settlement of his claim. *See* Industrial Accident Board Rule 55.15 (1990) (compromise settlement agreement must state that "the employee has achieved maximum recovery, or that other good reason exists for settlement prior to maximum recovery"). Thus, settling employees have (or at least claim to have) permanent disabilities. This general rule is now an absolute rule. The Texas Workers' Compensation Act, which became effective January 1, 1991, flatly prohibits any settlement "before the employee reaches maximum medical improvement." Tex. Rev. Civ. Stat. Ann. art. 8308-4.33(c) (Vernon Supp. 1993).

his options.[5] If Employee W had been released to return to work as petitioner was, he would have had his job at Excel, but only about $1,100 in weekly benefits from the date of petitioner's settlement until the date he was able to return to work. On the other hand, if Section 11(F) had *not* been in effect, and both petitioner and Employee W had gone back to work in January, 1991, it is obvious that petitioner would have been some $26,000 better off than Employee W, based on petitioner's inaccurate medical diagnosis.

Respondent believes that Section 11(F) constitutes a fair mechanism for resolving the status of employees who have no reasonable prospect of being physically able to return to work. Respondent submits that this provision does not discriminate *against* any employee for pursuing workers' compensation benefits in good faith; rather, it has the effect of leveling the field between employees who choose to or who must pursue workers' compensation benefits on a weekly basis and those who elect to settle their claims for a lump sum. Respondent acknowledges that reasonable minds may differ as to whether Section 11(F) constitutes the most desirable approach to the issues it covers. However, because the provision cannot be said to be discriminatory or retaliatory – or contrary to state law – on its face, an employee who would challenge its validity must necessarily seek construction and interpretation of the provision itself, and possibly of its relationship with other provisions of the CBA.

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[5] Petitioner's settlement check was equivalent to about 18 months' pay at Excel.

3. Petitioner's discrimination claim is actually a request for enforcement of another CBA provision.

Although petitioner argues in conclusory terms that Section 11(F) is unlawful, he is in fact seeking the most intricate CBA interpretation. Moreover, by relying on the interrelationship between Sections 11(F) and 11(D) to support his discrimination claim, he is effectively asking for *enforcement* of Section 11(D). Article XVII, Section 11(D), of the CBA authorizes respondent to discharge employees for "[a]bsence from work for any reason for a period of more than eighteen (18) months." Record at 359. Petitioner states that "the combined effect of these two provisions" was to allow recipients of weekly compensation benefits eighteen months to recover, but to require those who obtained lump sum settlements to be ready to work immediately.

The CBA can be the only basis for petitioner's claim that he (and other settling employees) were discriminated against by not being given eighteen months to recover. Texas law does not require that an employee with a work-related injury be given any particular amount of time to recover before his employer may lawfully terminate him. *See Pope v. MCI Telecommunications Corp.*, 937 F.2d 258 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1956 (1992) (42 days); *Swearingen*, 968 F.2d 559 (24 months). *See generally Harris v. American Red Cross*, 752 F.Supp. 737, 740 (W.D. Tex. 1990) ("Texas state courts have consistently found that an employee with a work-related injury may be lawfully terminated").

Petitioner himself concedes that all claims seeking enforcement of a collective bargaining agreement are preempted by Section 301, even if the plaintiff purports to bring the claim under state law. Petition at 7. Given his reliance on Section 11(D), that concession may be sufficient to resolve this case.[6]

B. The Court of Appeals' Decision Does Not Insulate Labor Contracts from Review.

Petitioner complains that an employer and a union will "be able to insulate [themselves] from review under state law," Petition at 12, because under the decision below, "there is no forum to which an employee may bring his claim that the CBA violates state law," Petition at 9. Petitioner does not and cannot cite any authority for this proposition, for it is simply untrue. It is true that, when an employer and a labor union negotiate an agreement and when an employee's claim requires interpretation of the agreement, state law may be applied only in the context of federal labor policy. Federal labor law, "necessarily uniform throughout the nation," is the proper standard by which terms in a collective bargaining agreement should be judged. *See Lingle*, 486 U.S. at 406. This does not mean that employees are left without a

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[6] Furthermore, this Court has never limited the scope of Section 301 preemption to contract enforcement, but rather has specifically stated that "the preemptive effect of § 301 must extend beyond suits alleging contract violations." *Allis-Chalmers*, 471 U.S. at 210. More recently, the Court affirmed that application of state law is preempted "if such application requires the interpretation of a collective-bargaining agreement." *Lingle*, 486 U.S. at 413.

remedy. The union and the employer cannot insulate themselves from review under *federal* law; and state law may be consulted in the formulation of federal law.

An employee may raise the concerns expressed in statutes such as article 8307c in a suit filed either under Section 301 or under Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a). Although state law will not govern the decision, it may be considered and, where appropriate, incorporated into federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. at 457 ("state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy").

Under Section 9(a) of the National Labor Relations Act, a union has the duty to represent all members of the bargaining unit in the negotiation, administration and enforcement of the collective bargaining agreement "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1013-14 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *see* 29 U.S.C. § 159(a). This duty has been implied as a corollary to the union's statutory role as exclusive representative of the bargaining unit. *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 & n.14 (1983). Federal courts have jurisdiction over cases alleging breach of the union's duty of fair representation arising out of negotiation of a collective bargaining agreement, including, as would be the case here, alleged discrimination in the negotiation of seniority provisions. *Ackley v. Local Union 337*, 910 F.2d 1295, 1302 (6th Cir. 1990). *See*

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); *Deboles*, 552 F.2d 1005.

Furthermore, courts will not enforce a term of a collective bargaining agreement that violates public policy. *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). "Such a public policy, however, must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). Whether a term of a collective bargaining agreement violates public policy is a matter of federal law for the court to determine. *Malden Mills v. ILGWU Nat'l Retirement Fund*, 766 F. Supp. 1202, 1209-10 (D. Mass. 1991) (citing *United Paperworkers' Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987); *W. R. Grace*, 461 U.S. at 766). This issue could arise in a variety of contexts under Section 301, including a suit by the employer to enforce the contract provision and a suit by the employee challenging his discharge under the provision.

C. This Case Is Not An Appropriate Vehicle for Revisiting the Scope of Federal Preemption.

In the evolution of Section 301 preemption doctrine, this Court has generally given Section 301 a broad preemptive scope. *See, e.g., Allis-Chalmers*, 471 U.S. 202; *Lucas Flour Co.*, 369 U.S. 95. Petitioner maintains that, despite the guidance provided by this Court in *Lingle* and *Allis-Chalmers*, the lower courts are in broad disarray in determining when state-law claims are or are not preempted. *See* Petition at 13-17. A closer analysis of the cases reveals

that petitioner's overbroad statement relies on lower court cases grappling with issues at the outer boundaries of the preemption field. In so doing, petitioner admittedly focuses on issues not raised in this case and ignores the fact that this case fits squarely within the definition of a preempted claim, i.e., one whose resolution requires interpretation of a term of a collective bargaining agreement. Accordingly, this case is not an appropriate vehicle for defining the outer limits of preemption in the workers' compensation context, much less in the broader areas suggested in the Petition.

Like this Court, lower federal courts have shown a strong tendency, both before and after *Lingle*, to find unionized workers' state-law claims preempted. *See* Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. Chi. L. Rev. 575, 606-07 (1992) (survey of recent preemption cases reveals broad preemption of unionized workers' claims). The pre-*Lingle*, lower court cases raised by petitioner are inapposite. *See* Petition at 13-14. The post-*Lingle* cases, with one exception, do not address preemption as it relates to a claim of retaliatory discharge in the workers' compensation context. *See id.* at 14-16, and cases cited therein. The one case cited by petitioner that does allege retaliatory discharge for filing a workers' compensation claim is *Eldridge v. Felec Services, Inc.*, 920 F.2d 1434 (9th Cir. 1990). The court in *Eldridge* evidenced no confusion when, relying heavily on *Lingle* and Alaska law, it concluded that the claim for breach of the implied covenant of good faith and fair dealing was not preempted. The *Eldridge* court

did not address preemption in the context of an offensive attack on the legality of the labor contract.

Almost all of the remaining cases cited by petitioner to demonstrate lower court confusion and disarray address issues at the outer parameters of the preemptive field. This case cannot assist lower courts that allegedly continue to grapple with the question of preemption when the collective bargaining agreement is raised as a defense to an otherwise independent state-law claim. Petition at 14-15. In this case, the CBA was raised offensively, not defensively. Similarly, this case will not help resolve the question of whether a claim of discharge under a clearly discriminatory labor contract is preempted. In this case, the challenged CBA provision is not discriminatory or retaliatory on its face, and has never been held to be discriminatory or retaliatory. Petitioner's claim is unique. Petitioner alleges that respondent – by applying a specific provision of the CBA – discriminated against him because he *settled* a workers' compensation claim not because he filed a claim, hired a lawyer, instituted a proceeding, or testified. What is disputed is whether the *provision itself* was discriminatory or retaliatory and, therefore, unlike the agreement in *Lingle*, this CBA must be construed to resolve the claim. Moreover, the state-law claim asserted here requires not only an interpretation of the CBA provision alleged to be unlawful, but also *enforcement* of yet another CBA provision. Under *Lingle* and its predecessors, petitioner's claim is clearly preempted.

Even petitioner admits that "the broader questions identified [in the Petition] are not squarely presented here," and he does "not suggest that this is the right case

in which to resolve all of them." Petition at 16. If confusion exists in the area of preemption law, this case is not the right vehicle for this Court to revisit the issue. Further review of this case would not be likely to assist lower courts that have difficulty determining the outer boundaries of the preemption field, because this case fits squarely within the center of that field.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1992

MIGUEL MEDRANO,
Petitioner,

v.

EXCEL CORPORATION,
Respondent.

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

1. In an apparent effort to avoid the fact that this case squarely presents the question whether section 301 of the Labor-Management Relations Act bars a state from providing a cause of action for employees to challenge provisions in a collective bargaining agreement ("CBA") that violate state law, respondent Excel Corporation argues that the CBA did not violate state law, Opp. 12-17, and repeatedly insists that the CBA "has never been held to be unlawful, discriminatory or retaliatory." *Id.* 8-9, 12, 23.

The simple answer to this contention is that Excel had every opportunity to present at trial its factual and legal contentions about the existence of discrimination. Moreover,

if the preemption holding below is reversed, the court of appeals will be able to consider respondent's objections to the sufficiency of the evidence to support the jury's verdict, and any other state law arguments that were properly raised below. The court of appeals did not address those claims, but rather proceeded directly to the preemption question, assuming that the CBA provisions were illegal. The central legal question of preemption -- which would bar a state from proscribing employer discrimination where that discrimination is authorized by a CBA -- is thus squarely presented.[1]

2. Respondent also tries to downplay the significance of the holding below, that states are preempted from providing a cause of action against unlawful CBA provisions, by arguing that CBA's are not insulated from review because their unlawfulness may be raised in a suit under section 301. Opp. 19-21. There are several flaws in this analysis.

First, although there is ample precedent for employers in section 301 cases to **defend** against enforcement of a CBA,

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[1] Because respondent's defense of the legality of its CBA was raised only in its reply brief in the court of appeals, it was not properly preserved. Even if it was preserved, there is no merit to the objection that the CBA is lawful because it provides for discharge upon the settlement, rather than the filing, of a workers compensation claim. An employer may not avoid the ban on discrimination by firing only those workers whose claims **succeed** in obtaining a permanent disability payment, while allowing those employees who do not pursue their claims to a successful conclusion to retain their employment. With respect to respondent's complicated factual hypothetical, under which workers are better off under the CBA provision providing for immediate discharge once they obtain a workers compensation settlement, the question of whether the jury verdict finding discrimination is not supported by sufficient evidence is not before the Court, either in the petition or in a timely cross-petition.

or of an arbitral award enforcing a CBA, on the ground that, as construed, the CBA violates public policy, there is no precedent for an employee to sue under section 301 to enforce a public policy of his state, instead of seeking to enforce the CBA itself. Where it is the state public policy, and not the CBA, that provides the basis for the cause of action, it is hard to see how section 301 could allow an employee to bring the claim in federal court in the first place. Moreover, the notion that a CBA enforcement proceeding may be used to enforce public laws rather than contract provisions ignores the limit on which this Court insisted in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974): where an arbitrator relies upon public law, rather than the CBA, to supply a basis for his decision, the award must be vacated because it fails to draw its essence from the CBA. Reversal of this rule to allow unionized employees to enforce state public policy through the federal courts would work a dramatic increase in both federal jurisdiction and federal regulation of the workplace.

Second, although union negotiating decisions may, as respondent notes, be challenged under the duty of fair representation ("DFR"), Opp. 20, and even if this provided a valid basis for holding the union liable, it would provide no basis for suing the employer, which can only be held liable in a hybrid suit for actions taken in violation of the CBA itself. Moreover, the DFR allows unions a wide range of discretion in serving the collective interest of all members. Unions frequently trade away working conditions or seniority in order to secure better wages or benefits, and vice-versa. It is by no means clear, as a matter of federal law, that a union's decision to consent to discrimination against certain workers compensation recipients in order to secure benefits that, in its judgment, are more important, would be a breach of the DFR.

Third, even if there were some basis for suing employers under section 301 for violating state public policies, where the federal courts deemed it appropriate to incorporate

a given state policy into the fabric of federal labor law, the question would remain why the state police power, which unquestionably authorizes the regulation of the terms and conditions of employment, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754-756 (1978), should be supplanted by a federalized code of regulation. Some substantive federal labor statutes may preempt particular state rules, because they interfere with the particular federal policies advanced by the statute. *E.g.*, *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986). Section 301, however, does not provide a basis for such fine-tuned preemption to support particular policies. If section 301 preemption applies, it extends to any state rule that a particular employer and a particular union may desire to negate. As the Court stated in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985), and as respondent again ignores, section 301 preemption should not be turned into a way for employers and unions to contract out of state laws of which they disapprove.

3. The petition argued for review, in part, based on widely conflicting lower court holdings in three other areas of section 301 preemption -- (1) where the CBA is raised as a defense, but the state claim may nevertheless be able to be decided without reference to the CBA, or the federal defense is resolved under federal law while not preempting the state claim, Pet. 14-15; (2) where the state claim is based on intentional infliction of emotional distress, *id.* 15-16; and (3) where an employee seeks to enforce state anti-discrimination laws. *Id.* 16. *See also Croston v. Burlington Northern Railroad Co.*, 143 LRRM 2702, 2706-2707 (9th Cir. 1993). Respondent objects to this aspect of the petition, arguing that most state law claims are properly being held preempted by section 301 in the lower courts, Opp. 22, and that the conflicts are insignificant because they are "at the outer parameters [sic] of the preemptive field." Opp. 23.

To the contrary, it is our experience that many lower federal courts have taken too broad a view of federal

preemption, and that *Lingle v. Norge*, 486 U.S. 399 (1988), has failed to drive home the proposition that the mere possibility of reference to a CBA is not a sufficient basis for preempting state law. Moreover, the discord in judicial responses to the three kinds of cases mentioned above is produced by the same analytic error that infects the decision below -- the assumption that the need to discuss a CBA provision at all, even if only to determine whether it is illegal, is a sufficient basis to preempt the claim of illegality. Consequently, even though the three other issues are not presented here, because this case turns on the same kind of error that often affects cases involving those issues, those conflicts further support review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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